

# EEOC Issues Long-Awaited Harassment Guidance and Six Enforcement Priorities

No, it's not Friday the 13th, but the U.S. Equal Employment Opportunity Commission (EEOC) has released its [Strategic Enforcement Plan for 2024-2028](#), and the future looks spooky for employers. The Strategic Enforcement Plan highlighted six key issues the EEOC seeks to prioritize in the future fiscal year period. The EEOC also published draft enforcement guidance regarding workplace harassment, titled "Proposed Enforcement Guidance on Harassment in the Workplace." The proposed guidance addresses several issues unique to the 21st-century modern-day workplace. The recent activity from the EEOC may be a signal for employers to refocus their policies.

## 1. Eliminating Barriers in Recruitment and Hiring

The EEOC plans to focus on recruitment and hiring practices that rely on artificial intelligence (AI), to make or assist in hiring decisions, recruit applicants or target job advertisements. The EEOC likely will scrutinize whether using AI systems during the hiring process intentionally excludes or adversely impacts protected groups. Simply put, if a hiring algorithm is based on a successful hire made in the past, the algorithm might then focus on certain characteristics in the future, such as sex, race or national origin, which could violate Title VII. The EEOC is additionally focusing on application processes or systems that are inaccessible for individuals with disabilities or other protected groups to access.

## 2. Protecting Vulnerable Workers and Persons

The EEOC broadly defines "vulnerable workers," including:

- Immigrant/migrant workers;
- Workers on temporary visas;
- Workers with developmental or intellectual disabilities, or with mental illnesses;
- Workers with records of arrest or conviction;
- LGBTQI+ individuals;
- Temps;
- Older workers;
- Workers in low-wage jobs, including teenagers;
- Survivors of gender-based violence;
- Native Americans/Alaska Natives; and

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- Individuals who are not proficient in the English language.

### 3. Emerging and Developing Issues

Additional issues the EEOC seeks to prioritize are:

- Qualification standards and inflexible policies or practices that discriminate against individuals with disabilities;
- Pregnancy and related conditions; and
- Addressing discrimination influenced by or arising as backlash in response to local, national or global events (including employment discrimination associated with long-term effects of the COVID-19 pandemic).

### 4. Equal Pay

The EEOC's focus on employer policies include "pay secrecy policies, discouraging or prohibiting workers from asking about pay or sharing their pay with coworkers," and considering salary history or an applicants' salary expectations to set pay. Considering salary history is already prohibited in some states—Wisconsin **not** included—but the EEOC has taken the unprecedented position that use of salary history information violates the federal anti-discrimination laws.

### 5. Preserving Access to Legal System

The EEOC will scrutinize "overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements."

### 6. Systemic Harassment

The EEOC does not provide a definition for "systemic harassment," but states it will "focus on a widespread pattern or practice of harassment."

The EEOC also announced its proposed "Enforcement Guidance on Harassment in the Workplace," now available for public comment.

The guidance covers a range of issues related to workplace harassment and reflects significant changes in the law. One notable change is that sex-based discrimination now includes discrimination based on gender identity. Examples of this type of discrimination include epithets regarding sexual orientation or gender identity; harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender; intentional and repeated use of a name or pronoun inconsistent with the individual's gender



identity; or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

The guidance also clarifies that conduct within a *remote* workplace environment, such as racist or sexist comments made during video meetings or racist imagery that is visible in an employee's remote workspace can contribute to a hostile work environment. The EEOC further broadened the type of conduct upon which employees may rely to support their hostile work environment claim by including "conduct that occurs in a non-work-related context...ha[ving] consequences in the workplace." Although employers generally are not responsible for conduct occurring outside work-related contexts, they may be liable when the conduct has consequences in the workplace and contributes to a hostile work environment. This is likely to include electronic communications using personal phones, computers, or social media accounts if it impacts the workplace.

The EEOC's focus is not likely to become employer-friendly in the near future, but employers should not be frightened. If you have any questions or concerns regarding the proposed enforcement guidance, please contact [Katie D. Triska](#), [Robert S. Driscoll](#) or your Reinhart attorney.

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